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Judicially Licensed Pollution: Condemnation of Private Property for Private Use, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (1970)

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JUDICIALLY LICENSED POLLUTION: CONDEMNATION OF PRIVATE PROPERTY FOR PRIVATE USE

Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970)

Eight landowners residing, or doing business, near defendant's cement plant brought an action for an injunction and damages for the emission of cement dust and raw material in the form of airborne particulate matter onto their property.[1] The trial court denied the injunction, but granted damages of approximately $200,000.[2] The trial judge concluded that, although the defendant maintained a nusiance,[3] the public benefit from the plant's operation, and the defendant's investment of over $40,000,000, precluded the issuance of an injunction.[4] On appeal to the Court of Appeals of New York, the case was reversed and remanded, with instructions to the trial court to issue an injunction to be vacated upon payment of damages.[5]

The result of the appellate court decision is an inverse condemnation[6] of certain rights in plaintiff's land,[7] to be paid for by a damage award.[8] The court reasoned that the potential economic loss to the public, in the form of employment and taxes,[9] and to the defendant in the form of lost profits,[10] required the refusal of a permanent injunction.

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1 Boomer v. Atlantic Cement Co., 55 Misc.2d 1023, 287 N.Y.S.2d 112 (S. Ct. 1967). The plaintiffs also complained about excessive vibrations from blasting, but this was not discussed in coming to a decision by any of the courts.

2 *Id* at 1026, 287 N.Y.S.2d at 115. Permanent damages were assessed, to be paid to the plaintiffs on their agreement to forego further actions based on dust emissions, etc. This agreement was to be binding on the plaintiffs' successors in interest. *Id.* Curiously, the court of appeals characterized the damages granted by the trial court as a temporary measure, yet there seems to be no difference in permanence between the judgment of the lower court and the decision of the court of appeals.

3. *Id* at 1024, 1025, 287 N.Y.S.2d at 113, 114.

4 *Id* at 1024, 287 N.Y.S.2d at 114.

5 Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

6 "Inverse condemnation" is, generally, the judicial approval of a taking for public purposes of land or rights in land by use without prior condemnation. The condemnation is "inverse" in that the judicial finding of public benefit occurs after the taking in fact. *See* Ferguson v. Village of Hamburg, 272 N.Y.234, 5 N.E.2d 801 (1936).

7 Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, ____, 257 N.E.2d 870, 875, 309 N.Y.S.2d 312, 319 (1970). There is no discussion of precisely what rights in land are being condemned. They seem to amount to, in the words of the trial judge, ". . . the reasonable use of the property and thereby . . . his enjoyment of life and liberty therein."

8 *Id.*

9 *Id* at ____, 257 N.E.2d at 873 n. 309 N.Y.S.2d at 316 n.

10 The courts recognized that, because it is presently impossible to control this kind of

Judge Jason dissented, arguing from *Whalen v. Union Bag & Paper Co.*[11] *inter alia,* that the plaintiffs were entitled to a permanent injunction.[12] He stated that the assessment of a permanent servitude upon the plaintiffs' land without their consent was a condemnation of land for private purposes, and that such a condemnation is forbidden by the New York Constitution.[13] The public good sought to be protected by the majority would be better served, in his view, by enjoining the practice, which is a continuing wrong as a health hazard to the public as well as a nuisance to the landowner-plaintiffs.[14] The solution proposed by Judge Jason was an injunction to take effect after a reasonable time.[15]

The New York doctrine in these kinds of cases has been, generally, that when substantial damages are suffered from the maintenance of a nuisance by a private person, an injunction will issue.[16] The leading New York case, *Whalen v. Union Bag & Paper Co.,*[17] held that, when there is a showing of substantial harm from nuisance, the plaintiff has a right to an injunction regardless of disparities between the loss to the plaintiff and the defendant's abatement costs.[18] In that case, which the majority in *Boomer* cites as the law in New York,[19] the plaintiff suffered damage

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particulate emission, an injunction ordering the defendant to abate the nuisance would result in the defendant closing his plant for an indefinite period of time.

11. 208 N.Y. 1, 101 N.E. 805 (1913).

12. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, ___, 257 N.E.2d 870, 875, 309 N.Y.S.2d 312, 319, 320 (1970).

13. *Id.* at ___, 257 N.E.2d at 876, 309 N.Y.S.2d at 321 (1970).

14. *Id.* at ___, 257 N.E.2d at 876, 309 N.Y.S.2d at 320.

15. *Id.* at ___, 257 N.E.2d at 871, 309 N.Y.S.2d at 322.

16. *E.g.,* Spadafora v. Nolan Corp., 66 N.Y.S.2d 127 (A.D. 1946); Hard v. Blue Points Co., 170 A.D. 524, 156 N.Y.S. 465 (1915); Western New York Water Co. v. City of Niagara Falls, 21 Misc. 73, 154 N.Y.S. 1046 (Sup. Ct. 1915); Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907); Stroebel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900); Campbell v. Seaman, 63 N.Y. 568 (1876).

17. 208 N.Y. 1, 101 N.E. 805 (1913).

18. Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 5, 101 N.E. 805, 806 (1913). The *Whalen* doctrine has a long and consistent history in New York (*See* note 16, *supra*). The first case to explicitly set out the rule was Campbell v. Seaman, 63 N.Y. 568 (1876), in which the court enjoined the operation of a brick-kiln that was emitting gases which were killing neighboring ornamental trees (*Id.* at 585). The court in *Campbell* held that, when there is substantial harm and when, because of the continuing nature of the condition causing the harm, damages are not a sufficient remedy, the plaintiff has an unconditional right to an injunction (*Id.* at 582), unless there are circumstances which render an injunction useless to the plaintiff. [For an example of this kind of circumstance, *see* McCann v. Chasim Power Co., 211 N.Y. 301, 105 N.E. 416 (1914).]

19. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, ___, 257 N.E.2d 870, 872, 309 N.Y.S.2d 312, 315 (1970).

of $100 per year from the polluting effluents of the defendant's paper-mill. The pollution was enjoined, the court saying:

> Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.[20]

New York courts have "balanced the equities"[21] in certain nuisance cases. In these cases the two elements necessary in New York to a proper condemnation of land are present: first, the tortfeasor has legislative authority to exercise the power of eminent domain;[22] second, the nuisance is incidental to a public use.[23] Under this line of cases, the remedy fashioned has been permanent damages and a condemnation of rights in the land affected by the harmful activity.[24]

All cases relied upon by the majority in *Boomer* contain both these elements necessary to a departure from the *Whalen* doctrine.[25] *Boomer,* on the other hand, does not contain either of the required elements.[26] Therefore, the holding in *Boomer* is not supported by the cases it cites, and is an unwarranted departure from the *Whalen* doctrine.

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20 Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 5, 101 N.E. 805, 806 (1913).

21. "Balancing of Equities" is the practice of balancing the relative hardships that would result from the imposition of an equitable remedy, usually an injunction. Some examples of the factors used in the balancing process are: cost to the defendant in relation to the cost to the plaintiff in sustaining the loss, the public benefit that might be lost by enjoining a particular practice, and (sometimes) the relative weight of the evidence on each side of the controversy. While this balancing process is usually used in determining the "equity" of an injunction, it is sometimes used as a factor in determining the existence of a nuisance. For an example of this last, *see* Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. 1954).

22 *See* Condemnation § 3 (McKinney 1950); *In re* Gardiners Avenue, Levittown, 207 Misc. 190, ___, 136 N.Y.S.2d 166, 168 (Sup. Ct. 1954). *See also* New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936).

23. Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936); Sammons v. City of Gloversville, 175 N.Y. 346, 67 N.E. 622 (1903).

24. Pappenheim v. Metropolitan Elevated Ry., 128 N.Y. 436, 28 N.E. 518 (1891); Lynch v. Metropolitan Ry., 129 N.Y. 274, 29 N.E. 215 (1891); Westphal v. City of New York, 177 N.Y. 140, 69 N.E. 369 (1904).

25. *E.g.* Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936). In that case, the court assessed permanent damages against the defendant for diversion of stream waters in which plaintiffs had riparian rights. The permanent damages were given instead of an injunction because of the important public use to which the water was put—a municipal water supply.

26. *See* Pocantico Water Works Co. v. Bird, 130 N.Y. 249, 29 N.E. 246 (1891). "It is doubtless true that in order to make the use public a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended." 130 N.Y. at 259, 29 N.E. at 248. In the *Boomer* case, there is no duty to the public that the defendant must fulfill.

The *Boomer* court attempts to justify its departure from *Whalen* by its statement that the prospect of further actions by other potential plaintiffs, and the possibility of large damage awards, would provide a sufficient incentive toward research to solve the problem.[27] It is unlikely that the *Boomer* decision will create such an incentive. Even if other persons similarly situated with respect to the defendant's plant were to bring actions, the damages assessed in payment of the servitude would be small compared to the cost of developing abatement devices. Further, these payments would be tax deductible.[28]

The *Boomer* court recognized its power to use a decision in private litigation to achieve desirable public objectives. Nevertheless, it refused to exercise this power by the rationale that the judicial establishment is neither equipped nor prepared to lay down and implement an effective policy for the elimination of air pollution.[29] Although this rationale is sound on its face, it becomes absurd when examined in light of the problem before the court. In order to reach a decision which would achieve the desirable objective of curtailing harmful pollution, the court did not have to lay down and implement new policy. It had only to follow the *Whalen* doctrine of granting an injunction when a nuisance results in substantial continuing damage. In effect, the *Boomer* court has licensed the defendant, by payment of a one-time fee in the form of damage awards, to pollute the air indefinitely.

As a result of the *Boomer* decision, the protection for the small landowner fashioned in *Whalen* is abandoned. The homeowner-resident, or the small businessman, is at the mercy of any manufacturer large enough to be considered a "public benefactor."

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27. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, ___, 257 N.E.2d 870, 873, 309 N.Y.S.2d 312, 317 (1970).

28. INTERNAL REVENUE CODE, 26 U.S.C. § 161 (1954).

29. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, ___, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314, 315 (1970).